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MOTION TO SUPPRESS (#79)

<sup>1</sup> “[W]henever a defendant maintains his or her innocence but pleads guilty pursuant to Alford, the plea constitutes one of *nolo contendere*.” *State v. Gomes*, 112 Nev. 1473, 930 P.2d 701 (1996).

1 his state conviction for purposes of the sentencing enhancement under § 1326(b)(2).

## 2 BACKGROUND

3 At the preliminary hearing held in state court regarding defendant's battery charge, the victim,  
4 Ricardo Ramirez, testified that he could not identify Cedano-Perez as the person who shot him. (#79  
5 Exhibit E). After the hearing, defendant received new counsel, Mrs. Connolly. (#79). Defendant  
6 informed Mrs. Connolly of Ramirez' testimony. *Id.* However, as the transcript of the hearing was  
7 allegedly lost and Ramirez was unreachable, defendant had no evidence to support his assertion. *Id.*  
8 Mrs. Connolly represented to the state court judge that she could not locate the victim to acquire further  
9 testimony, and that it was "not clear what happened" in this case. (#79 Exhibit E Transcript of  
10 Sentencing). Mrs. Connolly advised defendant to plead guilty in light of the missing transcript and  
11 victim. (#79). Therefore, defendant entered an Alford plea, and was sentenced accordingly. *Id.* Mrs.  
12 Connolly admitted during the sentencing that due to the circumstances and "the time [the defendant]  
13 was facing, [he] took the Alford plea." (#79 Exhibit E Transcript of Sentencing). After completing his  
14 sentence, defendant was deported in December of 2000. (#79).

15 Thereafter, on September 30, 2009, defendant was arrested, and subsequently charged with  
16 illegally reentering the United States. (#1). Thereafter, defendant's prior counsel, Federal Public  
17 Defender Raquel Lazo, attempted to obtain the transcript of defendant's preliminary hearing from the  
18 state court conviction. (#79 Exhibit H). The state court informed Mrs. Lazo that the transcript did not  
19 exist, and it wasn't until the third attempt to acquire it, that the transcript was finally disclosed. *Id.*  
20 Upon review of the lost preliminary hearing transcript, it was clear that Ricardo Ramirez testified that  
21 he could not identify Cedano-Perez as the person who shot him. (#79 Exhibit E). In light of the  
22 transcript finally being found, defendant Cedano-Perez filed a motion to dismiss the indictment based  
23 on his assertion that the state conviction and subsequent deportation were unconstitutional. (#69). The  
24 court denied the motion, and held that as the prior conviction was relevant *only* to the sentencing  
25 enhancement, and had "nothing to do with the sufficiency or validity of the Indictment," there was no

1 grounds to dismiss the indictment. (#72 and #77).

## 2 ARGUMENT

3 In the present motion, defendant Cedano-Perez asserts that, “based on newly discovered  
4 evidence,” i.e. the preliminary hearing transcript, his prior state conviction was unconstitutional and  
5 should be suppressed. (#79). Defendant contends, that he was innocent of the state court charges, and  
6 “but for” the ineffectiveness of Mrs. Connolly, he would not have plead guilty. *Strickland v.*  
7 *Washington*, 466 U.S. 668, 687 (1984). He argues that Mrs. Connolly never insisted on the disclosure  
8 of the transcript, never investigated the charge, and did not interview other witnesses to the events.  
9 (#79). Further, he argues that Mrs. Connolly, without challenging the sufficiency of the evidence  
10 against him, told the defendant that he had to plead guilty or he would spend the rest of his life in jail.  
11 *Id.*

12 In support of defendant Cedano-Perez’ assertion that the victim Ramirez had testified that the  
13 defendant was innocent, he provides the court with a signed statement from Ramirez. (#79 Exhibit A  
14 and B). In the statement, Ramirez asserts that when he was examined by the attorneys at the hearing  
15 in the presence of Cedano-Perez, he testified that he did not see the person who shot him in the  
16 courtroom. *Id.* Further, Ramirez states that it is his understanding that “Mr. Cedano was falsely  
17 accused, incriminated, convicted, and incarcerated for something that Mr. Cedano did not committ  
18 (sic).” *Id.* Defendant Cedano-Perez also submitted to the court the transcript of the preliminary hearing.  
19 (#79 Exhibit E).

20 In opposition to the defendant’s motion, the government states that the defendant “again raises  
21 the same arguments that do not include the only legal challenge he can make against his prior  
22 conviction, that it was obtained in violation of *the right to counsel*. *Daniels v. United States*, 523 US  
23 374, 384 (2001).” (#80)(emphasis added). The court notes that defendant spends approximately nine  
24 pages of his motion discussing the ineffectiveness of his counsel Mrs. Connolly during the state  
25 proceedings. (#79). Not only does he assert in those pages that Mrs. Connolly’s performance was  
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deficient, but he cites supporting authority and demonstrates how he was “prejudice[d] and denied fundamental fairness” by her actions. *Id.* Therefore, the government’s contention that he failed to “include the only legal challenge he can make” is not supported by the record.

The government does, however, correctly argue that a motion to suppress goes to the admissibility of evidence at trial, and the prior conviction would not be something admitted at trial anyhow, because it relates *only* to the sentencing, and is not an element of the offense. (#80); See *United States v. Pacheco-Zepeda* 234 F3d 411, 413-15 (9th Cir 2000).

### RELEVANT LAW

Pursuant to Federal Rule of Criminal Procedure 12(b)(3)©, a motion to suppress evidence must be raised before trial. Rule 404(b) of the Federal Rules of Evidence provides that “[e]vidence of other crimes, wrongs, or acts is not admissible...,” unless it is used to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...” In cases where the court may consider a prior conviction, such as in §1326(b), however, the law “simply authorizes a court to increase the *sentence* for a recidivist...[and] does not define a separate crime.” *Almendarez-Torres*, 523 U.S. 224, 226, 118 S.Ct. 1219, 140 L.Ed.2d. 350 (1998)(emphasis added). Therefore, it is not proper to argue whether a sentencing judge should consider a prior conviction under 8 U.S.C. § 1326(b) in a motion to suppress. *Id.*

The Supreme Court has ruled that “[i]f an enhanced federal sentence will be based in part on a prior conviction obtained in violation of the *right to counsel*, the defendant may challenge the validity of his prior conviction *during his federal sentencing proceeding*.” *Daniels v. United States*, 532 US 374, 382 (2001)(citing *Custis v. United States*, 511 U.S. 485, 496, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994)(emphasis added)). However, if “a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse.” *Daniels*, at 382. Despite this, the Supreme Court has recognized that “there

1 maybe rare cases in which no channel of review was actually available to a defendant with respect to  
2 a prior conviction, due to no fault of his own.” *Id.* at 383.

### 3 DISCUSSION

4 As previously stated, defendant Cedano-Perez is charged with being a deported alien found  
5 unlawfully in the United States, in violation of 8 U.S.C. § 1326. (#1). A prior state conviction is not  
6 an element of the offense charged, and any evidence thereof would not be admissible at trial. *See* 8  
7 U.S.C. § 1326(a)(stating that “any alien who—has been denied admission, excluded, deported, or  
8 removed or has departed the United States while an order of exclusion, deportation, or removal is  
9 outstanding, and thereafter...enters, attempts to enter, or is at any time found in, the United States...shall  
10 be fined under Title 18, or imprisoned not more than 2 years, or both.”); *see also* Federal Rules of  
11 Evidence 404(b)(stating that evidence of other crimes is not admissible.). Therefore, a motion to  
12 suppress is not the appropriate vehicle to obtain the relief defendant seeks. *See* Fed. R. Crim. P.  
13 12(b)(3)(C).

14 As the court previously stated in its order denying the motion to dismiss (#77), defendant  
15 Cedano-Perez may challenge the validity of his prior conviction *only* “during his federal sentencing  
16 proceedings.” *Daniels*, at 382 (citing *Custis*, at 496, 114 S.Ct. 1732). As defendant asserts in his  
17 motion (#79) that his state conviction was unconstitutional because of the ineffectiveness of counsel,  
18 he may fall into the exception carved out by the court in *Custis*. *Id.* (holding that the defendant may  
19 challenge his prior conviction “[i]f an enhanced federal sentence will be based in part on a prior  
20 conviction obtained in violation of the *right to counsel*”). Further, since defendant did not directly  
21 appeal his state court conviction and the transcript of the preliminary hearing in state court which  
22 supports his innocence was not “found” and disclosed until defendant’s Federal Public Defender  
23 obtained it in connection with defendant’s federal charge, defendant’s situation may be seen as one of  
24 the “rare cases in which no channel of review was actually available to [him]...due to no fault of his  
25 own.” *Daniels*, at 383 (holding that if the prior conviction is “no longer open to direct or collateral  
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1 attack,” he may still challenge this conviction if “no channel of review was actually available” at that  
2 time and there is now “newly discovered evidence” supporting the challenge.). Thus, at the time of  
3 sentencing, defendant may present to the court argument regarding the sentence enhancement for his  
4 prior conviction under 8 U.S.C. § 1326(b). (#77)(wherein the district judge held that the ineffectiveness  
5 of counsel “is relevant to sentencing,” and that “[i]n these circumstances, the [c]ourt suggests that a  
6 collateral attack on a prior state conviction used as a sentencing enhancement may be allowed.”).

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8 **RECOMMENDATION**

9 Based on the foregoing, it is the recommendation of the undersigned United States  
10 Magistrate Judge that defendant Cedano-Perez’ Motion to Suppress (#79) should be DENIED.

11 DATED this 2<sup>nd</sup> day of November, 2011.

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14 **CAM FERENBACH**  
15 **UNITED STATES MAGISTRATE JUDGE**  
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